No. 709

In the Supreme Court of the United States

OCTOBER TERM, 1938

IN THE MATTER OF SAM CAVALIERO, JR.,

PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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OPINION BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 10–17) are reported at 138 F. (2d) 100.

JURISDICTION

The judgment of the circuit court of appeals was entered September 23, 1943 (R. 18). By an order of Mr. Justice Roberts dated January 10, 1944 (R. 21),[1] the time for filing a petition for certiorari was extended to and including February 19,

[1] Although the transcript of record does not reflect it, we are advised by the Clerk of this Court that an earlier order extending the time for certiorari was entered within three months after the entry of judgment in the court below.

1944. The petition for a writ of certiorari was filed February 17, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, while in custody pending trial on an indictment charging him with failing to comply with an order of his draft board to report for induction into the armed forces, petitioner may by resort to habeas corpus secure a review of his Selective Service classification.

STATUTES INVOLVED

The Selective Training and Service Act of 1940, as amended (Acts of September 16, 1940, c. 720, 54 Stat. 885; Aug. 18, 1941, c. 362, 55 Stat. 626; Dec. 20, 1941, c. 602, 55 Stat. 844; Nov. 13, 1942, c. 638, 56 Stat. 1018), in pertinent part provides:

> Section 10. (a) The President is authorized—
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> * * * * *
>
> (2) to create and establish a Selective Service System, and shall provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service, and shall establish within the Selective Service System civilian local boards and such other civilian agencies, including appeal boards and agencies of appeal, as may be necessary to carry out the pro-

visions of this Act. * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe. * * * (50 U. S. C. App. 310 (a) (2).)

* * * * *

Section 11. Any person * * * who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *. (50 U. S. C. App. 311.)

R. S. 752, as amended, 28 U. S. C. 452, provides:

* * * the several judges * * * of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of

> an inquiry into the cause of restraint of liberty * * *.

R. S. 753, 28 U. S. C. 453, provides in pertinent part:

> The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof * * *.

R. S. 755, 28 U. S. C. 455, provides:

> The court, or justice, or judge to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto * * *.

STATEMENT

On October 27, 1942, petitioner was charged in a one-count indictment (R. 1–2) filed in the United States District Court for the District of New Jersey with having failed to comply with an order of his local board to report for induction for training and service in the military forces of the United States. Petitioner was taken into custody to stand trial on the indictment, and on November 30, 1942, he filed a petition for a writ of habeas corpus (R. 2–7), in which he prayed that the court also issue a writ of certiorari

directed to the local board requiring it to present to the court its files and the evidence relating to petitioner, to enable the court to determine the legality of petitioner's detention. The allegations of the petition were directed to showing that petitioner was a regular and duly ordained minister of religion and that his local board and the appeal board had acted arbitrarily and capriciously in classifying him I–A (available for military service).[2]

The trial court, apparently after a hearing (see R. 7), entered an order denying the petition

[2] The allegations of the petition (R. 2–7) may be summarized as follows:

At the time that he registered and filed his questionnaire with his local board, pursuant to the Selective Training and Service Act of 1940 (50 U. S. C. App. 301, et seq.), petitioner "claimed to be a regular and duly ordained minister of religion and requested that he be exempted from training and service by virtue of Section 5 (d) of the said Act." On October 21, 1941, petitioner was classified in Class I–H, a classification then accorded registrants over 28 years of age. In February 1942, he was reclassified into Class IV–E (conscientious objector), from which action he appealed. The appeal board reclassified petitioner into Class I–A (available for military service). Petitioner's efforts to induce the State Selective Service office to "appeal his classification of 1–A, in order that he might be classified in Class IV–D as a regular and ordained minister" were unsuccessful. After petitioner had been ordered to report for induction he sought in the United States District Court for the District of New Jersey to enjoin the enforcement of the induction order, but the court refused to issue a temporary restraining order and thereafter ordered the complaint dismissed. At the time of the petition he was in custody of the United States Marshal for the District of New Jersey "by reason of a certain information or

on the ground that the "defendant was held in custody on a charge of violation of the Selective Training and Service Act of 1940 in that he had failed to report for induction according to the order" of his local board, and that he "still neglects and refuses to comply with said order of induction" (R. 7–8). Upon appeal, the circuit court of appeals, *en banc*, affirmed the judgment of the district court, two judges dissenting (R. 10–17).

ARGUMENT

Petitioner does not deny that he knowingly failed to comply with an order of his local board directing him to report for induction (see Pet. 5). Instead, he contends, in effect, that the Selective Service boards acted arbitrarily and capriciously in classifying him; that the local board's order was therefore void and, thus, furnished no basis

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complaint" charging petitioner with having failed to report for induction, as directed by his local draft board.

Petitioner further alleged that he "is a regular and duly ordained minister" of the Watchtower Bible and Tract Society of Brooklyn, New York; that he submitted to his board "full and conclusive" proof that he had been a minister since 1937 and he attempted to prove that fact to the appeal board, but he was not given a hearing on the appeal; that the local board failed to consider petitioner's proof, contrary to the Selective Service Regulations, and in classifying petitioner as they did the local and appeal boards acted arbitrarily and capriciously; that as a result of the improper administrative action "petitioner has been wrongfully charged with violating the provisions" of the Selective Training and Service Act and is now deprived of his liberty; and that petitioner is being deprived of his liberty in violation of the 5th Amendment and of the free exercise of religion guaranteed by the First Amendment.

for the indictment; and that, the indictment being based on a void order, the process under which he was detained was likewise void (Pet. 3, 6–7, 13, 20–37).

Petitioner is attempting to reargue through the habeas corpus procedure issues which were presented and decided in *Falbo* v. *United States*, No. 73, this Term, decided January 3, 1944. Under that decision the matter asserted in the petition for a writ of habeas corpus does not constitute a defense to the indictment; therefore a conviction under it will be lawful and proper. In consequence there is no basis for habeas corpus.[3]

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[3] Petitioner cites (Pet. 21–22, 24–25, 29–30) *Ex Parte Stewart*, 47 F. Supp. 410 (S. D. Calif.), and *Goodwin* v. *Rowe*, 49 F. Supp. 703 (N. D. W. Va.), for the proposition that habeas corpus will lie prior to trial to test the propriety of the defendant's Selective Service classification. In respect of the latter case see *United States* v. *Goodwin*, 49 F. Supp. 510, 512 (N. D. W. Va.), in which the same judge, on the trial of the criminal charge, referred to the earlier habeas corpus proceeding in these terms: "Although I was very much in doubt as to defendant's right to raise the issue by writ of habeas corpus prior to his actual induction into 'work of national importance', I issued the writ and permitted a hearing thereon". After hearing in the *Stewart* case the defendant was not discharged from custody because he had failed to sustain his burden of proof. See 47 F. Supp. 415. However, the holding of the *Stewart* case that habeas corpus will lie to permit review of the classification whenever there is detention is in conflict with the decisions of other lower federal courts. Cases refusing the writ prior to trial, as shown by the Department's files, are *Ex Parte Enge*, No. 2726–B. H., S. D. Calif.; *Ex Parte Lindquist*, No. 969, D. Minn.; *Albert ex rel. Ravin* v. *Gouguen*, No. 3927, D. Mass.,

Furthermore, if the facts on which petitioner relies did show that he could not lawfully be convicted, the writ of habeas corpus was properly denied as a premature means of raising objections which orderly procedure requires should be raised at the trial. *Jones* v. *Perkins,* 245 U. S. 390; *Goto* v. *Lane,* 265 U. S. 393, 401; *Rodman* v. *Pothier,* 264 U. S. 399, 402–403; *Johnson* v. *Hoy,* 227 U. S. 245. Petitioner attempts to avoid this rule by observing that under the *Falbo* decision it could do him no good to raise his present objections at the trial. This, however, does not better petitioner's case since it emphasizes that the matter petitioner relies on fails to show either that his restraint in custody to answer the indictment is invalid or that a conviction would be unlawful.[4]

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all unreported. Cases refusing the writ after conviction are *United States ex rel. Falbo* v. *Kennedy*, January 24, 1944, S. D. W. Va.; *Heflin* v. *Sanford*, No. 1884, N. D. Ga.; *United States ex rel. Arpaia* v. *Alexander*, No. 1105, D. Conn.; *United States ex rel Lohrberg* v. *Nicholson*, January 8, 1944, E. D. Va., all unreported.

[4] Following the denial by the district court of petitioner's petition for a writ of habeas corpus, petitioner was tried and convicted of the offense charged in the indictment. He is now in custody pursuant to the judgment of conviction and a commitment based thereon, certified copies of which have been lodged with the Clerk. Thus petitioner is no longer in the custody of the respondent named in the petition for writ of habeas corpus (R. 6) and no longer is held to answer the process he attacks as unlawful. Apparently the cause is now moot. Cf. *Innes* v. *Crystal*, 319 U. S. 755.

CONCLUSION

We respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
ROBERT S. ERDAHL,
VALENTINE BROOKES,
Special Assistants to the Attorney General.
IRVING S. SHAPIRO,
Attorney.

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